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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 362

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*, *Petitioners*,

v.

WEBB'S CITY, INC., *Respondent*.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

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JURISDICTION

Petitioners seek a writ of certiorari to review a judgment of the District Court of Appeal of Florida, Second District, entered on April 17, 1963 (Appendix A to NAACP Petition). Petitioners base their claim for jurisdiction on 28 U.S.C. § 1257(3), but they do not seek review of the statutorily required "final judg-

ment . . . rendered by the highest court of a State in which a decision could be had." Under Article V, Section 4(2) of the Florida Constitution and Rule 2.1(5)(b) of the Florida Appellate Rules, review of the decision of the District Court of Appeal could have been sought in the Supreme Court of Florida. The failure to have sought such review renders the subject petition for writ of certiorari jurisdictionally defective, and it accordingly must be dismissed or denied.

QUESTIONS PRESENTED

1. Whether this Court can or should exercise jurisdiction over a petition for writ of certiorari when petitioners failed to seek a final judgment by the highest court of the State of Florida in which a decision could be had.

2. Whether, assuming jurisdiction, despite no claim by petitioners that the findings of the trial court or the intermediate appellate court were clearly erroneous, this Court should undertake merely to review the evidence and the findings based thereon.

3. Whether, assuming jurisdiction, in the circumstances of this case, the issuance of an injunction against certain specific conduct of petitioners constituted a deprivation of their constitutional rights.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The pertinent parts of Article V, Section 4 of the Florida Constitution are set forth in the Appendix to this brief. As there noted, Sections 2.1(5)(a) and (b) of the Florida Appellate Rules are identical in language.

COUNTERSTATEMENT OF THE CASE

The question of the issuance of an injunction against petitioners was tried before the Circuit Court of the Sixth Judicial Circuit of the State of Florida in and for Pinellas County. Careful findings were made by the Circuit Judge (sitting as Chancellor) in issuing an injunction; those findings subsequently were affirmed on review by the District Court of Appeal of Florida, Second Circuit. (Appendices C and A to NAACP Petition.) Petitioners do not claim those judicial findings to be clearly erroneous, but their statement of the case essentially disregards them and presents an incomplete and inaccurate factual picture. For this reason, although respondent submits that the petition for writ of certiorari must be dismissed for lack of jurisdiction and although it is not the function of this Court merely to resolve a factual dispute between parties, it is appropriate to state the facts within the confines of the findings of the courts below.

Webb's City, Inc. is a privately owned Florida corporation which does a varied and general mercantile business in the City of St. Petersburg, Florida. It employs approximately 1,700 employees, of whom approximately 150 are Negroes. With the exception of the store's eating facilities, Negro customers are welcome in all phases of its operations. Negroes are excluded from that part of the cafeteria where customers are seated. [R. 69-72 (R. 68, T. 4-8, 65).][1]

[1] The first citation within the brackets is to the trial court's findings; the citations within the parentheses are to the evidence supporting those findings. The record of the trial in the Circuit Court of the Sixth Judicial Circuit of the State of Florida was given the single page number 68; therefore it will be cited as R. [for record page] 68, T. [for transcript page].

On December 2, 1960, a group of approximately 30 men and women identified with the St. Petersburg Chapter of the National Association for the Advancement of Colored People began picketing Webb's City. The picketers carried placards which urged members of the public not to buy at Webb's City. The picketing was planned and conducted "with intent to disrupt and discourage trade with . . . [Webb's City] and in protest of . . . [its] policies of lunch counter segregation and not having Negro employees more in proportion to the percentage of . . . [its] Negro trade and not employing Negroes in top administrative positions." [R. 72 (R. 68, T. 58-59, 62).]

During the afternoon of December 2, 1960, the demonstrators marched into the trading area of respondent's premises. [R. 72.] Webb's City's president, J. E. Webb, testified that two groups composed of seven to ten men were "forcing their way with banners through various crowded areas of the store . . . . that the clerks were excited and more or less terrified. A lot of the elderly people immediately left the store." (R. 68, T. 11-12, 18.) The marchers went back outside the store after they were asked to leave by store executives and police arrived. (R. 68, T. 19-21.)

The picketing in front of the entrances to Webb's City continued without interference from respondent or the local authorities from December 2 through December 5, 1960. During this period the Webb's City switchboard "was subjected to numerous telephone calls from undisclosed and unknown parties who used profane language directed toward . . . [Webb's City] and its employees." [R. 73 (R. 68, T. 54-56).] Bombing threats were received during this period. (R. 68, T. 55.) On December 6, 1960, one of the participants

in the picketing—carrying a placard prepared by the NAACP—began physically interfering with customers attempting to enter Webb's City. This person was arrested; he subsequently entered a guilty plea to a charge of trespass. [R. 72-73 (R. 68, T. 11-12, 15, 35-40, 42-44, 71).] On the same day, respondent sought and the Circuit Court of the Sixth Judicial Circuit issued a temporary restraining order enjoining petitioners and all persons acting in conjunction with the petitioners from committing any of the following acts:

> "(a) Displaying signs, posters or handbills requesting that members of the public not trade with plaintiff, either on the premises of the plaintiff or on the sidewalk immediately adjacent thereto.
>
> "(b) Picketing the premises of the plaintiff located at 128 Ninth Street South, St. Petersburg, Florida, or interfering in any manner whatsoever with the free ingress and egress of the customers of the plaintiff at said place of business.
>
> "(c) Placing telephone calls to the place of business of the plaintiff, except for the purpose of transacting legitimate business with the plaintiff.
>
> "(d) Threatening any employee of the plaintiff, or threatening any person providing transportation to any such employee from his residence to the place of business of the plaintiff." [R. 70-71.]

Subsequently, on March 8, 1961, the cause came on for hearing before the Circuit Court of the Sixth Judicial Circuit on various motions by petitioners and on respondent's application for a permanent injunction. Petitioners disclaimed responsibility for the invasion of respondent's premises, for the invective, insulting, and threatening phone calls, and for the physical interference with customers entering Webb's

City. Notwithstanding such disclaimers, the Chancellor found that: "The corporate defendant and its agents who organized the demonstration did not limit participation in the picketing to members of their organization, but on the contrary invited participation in the demonstration by any interested citizen." [R. 72 (R. 68, T. 83-84, 86, 108-09).] The person arrested for trespassing had used a placard prepared by petitioners to block customers from one of the entrances to Webb's City, and petitioners took no steps to restrain such conduct. (R. 68, T. 37-39, 71.) Additionally, the period during which the Webb's City switchboard was flooded with insulting and profane telephone calls coincided with the picketing. (R. 68, T. 55-56.)

The circuit judge, sitting as Chancellor, ultimately found that the picketing demonstration conducted by petitioners "resulted in a tense and inflammatory situation in and about . . . [Webb's City's] premises which adversely affected the peace and tranquility of the community of St. Petersburg and created an atmosphere of potential violence." [R. 72 (R. 68, T. 11-12, 18-19, 36-37, 39, 51-52, 55).] The court also found that, as a direct consequence of such conduct, Webb's City "suffered loss of revenue of not less than $10,000.00 below the reasonably expected revenue for each of said days." [R. 73.] Accordingly, on May 3, 1961, the circuit court issued its judgment and decree granting the application for permanent injunction. [R. 76.] The decree, quoted *supra*, was narrowly limited to proscribe only certain conduct. It did not enjoin petitioners from continuing an economic boycott of Webb's City, or from the future exercise of their rights to protest any policies of Webb's City

with which they may be in disagreement "through conventional modes of communication." [R. 74.]

After respondent prevailed in the trial court, petitioners made a tactical decision as to judicial review. Rather than taking an appeal as of right to the intermediate District Court of Appeal of Florida, Second District, they elected to attempt to fit this case into the limited category of those in which a direct appeal may be taken from the trial court to the Supreme Court of Florida. Contending that the trial court had met the required constitutional test of "construing a controlling provision of the Florida or federal constitution" [Florida Constitution, Article V, Section 4(2)], petitioners on June 28, 1961 sought an appeal to the Supreme Court of Florida.

After the receipt of briefs and argument (including a memorandum by petitioners arguing in support of the jurisdiction of the Supreme Court of Florida), on September 25, 1962 the Supreme Court of Florida concluded that it did not have jurisdiction of the appeal. It transferred the case to the intermediate District Court of Appeal, Second District (NAACP Petition, Appendix B). The latter court affirmed the trial court's findings and decree on April 17, 1963 (NAACP Petition, Appendix A).

Petitioners elected not to seek review of that judgment in the Supreme Court of Florida. Instead, they filed a petition for writ of certiorari in this Court on August 12, 1963.

REASONS FOR DENYING WRIT

I. THE PETITION FOR WRIT OF CERTIORARI IS JURISDICTIONALLY DEFECTIVE

As noted in the counterstatement of facts, *supra*, petitioners took no steps to seek review by the Supreme Court of Florida—the highest court in that state—of the judgment of the intermediate District Court of Appeal. Accordingly, since a procedure for review by the Supreme Court of Florida readily was available to petitioners, the judgment which they now seek to have reviewed by this Court was not "rendered by the highest court of a State in which a decision could be had . . . ." 28 U.S.C. § 1257. The petition for a writ of certiorari thus is jurisdictionally defective.

The procedures for state court review which were available to petitioners are provided by Article V, Section 4(2) of the Florida Constitution. It provides in pertinent part that:

> "The supreme court may review by certiorari any decision of a district court of appeal . . . that passes upon a question certified by the district court of appeal to be of great public interest . . . ." [Florida Appellate Rule 2.1(5)(b) is identical.]

The quoted language is part of a 1957 constitutional amendment which was intended to make the Supreme Court of Florida a court of limited, rather than general, appellate jurisdiction.[2] Prior to 1957, the Supreme Court of Florida found that parties receiving adverse judgments in the district courts of appeal would petition for writs of certiorari virtually as a

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[2] See generally, Dreisbach, *Where To Appeal in Florida*, 32 FLA. B.J. 109, 115 (1958).

matter of course.[3] The review of such petitions, many of which presented frivolous questions, kept that court from giving adequate considerations to cases involving questions of great public interest. See *Lake* v. *Lake*, 103 So. 2d 639, 640-43 (Fla. 1958).

As fixed by the 1957 amendment, certiorari jurisdiction of the Supreme Court of Florida is basically similar to the jurisdiction of this Court to review the judgments of federal courts of appeals under 28 U.S.C. § 1254(1).[4] The primary difference (of vital significance here) is that under the Florida procedure, the intermediate appellate court rather than the highest court determines whether the case involves a question of great public interest.

The procedure for certification of a question of great public interest to the Supreme Court of Florida can be by the motion, *sua sponte*, of the district court of appeal, but usually it is initiated by petition of the losing party.[5] Once the district court of appeal certifies a question as being of "great public interest," the Florida Supreme Court then has jurisdiction to review the entire case on a writ of certiorari.[6] While the granting of the writ of certiorari remains within the

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[3] The former Article V, Section 5 of the Florida Constitution provided in pertinent part that: "The Supreme Court shall have appellate jurisdiction in all cases at law and in equity originating in circuit courts . . . ."

[4] Dreisbach, *supra* n. 2, at 114-15.

[5] See *Susco Car Rental System of Florida* v. *Leonard*, 112 So.2d 832, 834 n. 5 (Fla. 1959); James, *Certiorari Power of the Florida Supreme Court To Review Decisions of the District Courts of Appeal*, 15 MIAMI L. REV. 258, 259 (1961).

[6] *E.g.*, *Susco Car Rental System of Florida* v. *Leonard*, *supra*; *James* v. *Keene*, 133 So.2d 297, 298 (Fla. 1961); *Zirin* v. *Charles Pfizer & Co., Inc.*, 128 So.2d 594, 596-97 (Fla. 1961).

discretion of the Florida Supreme Court, the determination of the district court of appeal that the case involves a question of great public interest vests jurisdiction in the Supreme Court and is not subject to further review by the latter court. *Susco Car Rental System of Florida* v. *Leonard, supra,* 112 So. 2d at 834-35. Recognizing its constitutional function, the Supreme Court of Florida repeatedly has issued writs of certiorari in cases in which the district courts of appeal have certified the questions involved to be ones of great public interest.[7]

It is impossible to say that the district court of appeal would not have certified this case to the Supreme Court of Florida *had such certification been sought.* For reasons best known to themselves, petitioners decided against seeking such certification. Thus, the Supreme Court of Florida has had no opportunity to review the judgment herein, and the instant petition for a writ of certiorari addressed to this Court is fatally defective for want of jurisdiction. *E.g., Market Street Ry.* v. *Railroad Comm'n of California,* 324 U.S. 548, 551 (1945); *Gorman* v. *Washington University,* 316 U.S. 98, 99-101 (1942); *Stratton* v. *Stratton,* 239 U.S. 55, 56-57 (1915); *Mullen* v. *Western Union Beef Co.,* 173 U.S. 116, 119-123 (1899).

A case squarely in point is *Fisher* v. *Perkins,* 122 U.S. 522 (1887), in which a writ of error to the Superior Court of Kentucky was sought for review of a judgment of that court. The amount in litigation was less

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[7] *Ibid;* also *State* v. *Clemmons,* 150 So.2d 231 (Fla. 1963); *Farley* v. *Collins,* 146 So.2d 366 (Fla. 1962); *Confederation of Canada Life Ins. Co.* v. *Arminan,* 144 So.2d 805 (Fla. 1962); *Scherer & Sons, Inc.* v. *International Ladies' Garment Workers' Union,* 142 So.2d 290, 291 (Fla. 1962); *Sturgis* v. *Canal Ins. Co. of Greenville, South Carolina,* 122 So.2d 313 (Fla. 1960).

than $1,000, and the Court of Appeals, the highest court of Kentucky, did not have jurisdiction to review the final judgment of the intermediate Superior Court in such a case unless " 'any two of the judges of the Superior Court shall certify that, in their opinion, the question involved is novel, and is one of sufficient importance . . . .' " 122 U.S. at 523. No application had been made to the Superior Court for the allowance of an appeal to the Court of Appeals under the foregoing statute prior to seeking relief in this Court. This Court held that it lacked jurisdiction, stating:

> "The want of a certificate is good reason for refusing to allow an appeal, but until it has been asked for and refused its absence furnishes no ground for a writ of error from this court." 122 U.S. at 526.

Petitioners' sole attempt at justification of their fatal failure to exhaust their remedies below is the statement on page 6 of their petition that there were "no grounds for appealing the District Court's affirmance to the Supreme Court of Florida other than those already rejected by the Supreme Court of Florida." Such a statement is inaccurate, and disregards the certiorari provisions of the Florida constitution.

As noted *supra*, a direct appeal may be taken from a trial court to the Supreme Court of Florida from decisions "construing a controlling provision of the Florida or federal constitution." Florida Constitution, Article V, Section 4(2). When the Supreme Court of Florida, after receiving the benefit of briefs and argument, rejected jurisdiction of the case and transferred it to the intermediate court of appeal for resolution, such action probably did constitute a determination that the trial court's decision did not *construe* "a controlling provision of the Florida or federal

constitution." Although no reason was spelled out for transferring the case to the district court of appeal, the Supreme Court of Florida in other cases repeatedly has rejected direct appeals from Florida circuit (trial) courts on the ground that the judgment of the trial court did not *construe*, as distinguished from *apply*, a controlling provision of the federal or state constitution. *E.g., Armstrong* v. *City of Tampa*, 106 So. 2d 407, 409-10 (Fla. 1958); *accord, Page* v. *State*, 113 So. 2d 557, 558 (Fla. 1959). Thus, the rejection of jurisdiction by the Supreme Court of Florida of the petitioners' direct appeal "must be taken, nothing else appearing, as a holding by that court that the case was not one in which an appeal lay as a matter of right." *McMaster* v. *Gould*, 276 U.S. 284, 286 (1928).[8] In the *McMaster* case, this Court held that even if an appeal as a matter of right be dismissed, a petitioner still must pursue discretionary review by his highest state court if such procedures are available. 276 U.S. at 286-87; *accord, Matthews* v. *Huwe*, 269 U.S. 262, 265-66 (1925); *Southern Electric Co.* v. *Stoddard*, 269 U.S. 186, 189-90 (1925).

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[8] The cases of *Minneapolis, St. Paul & Sault Ste. Marie Ry.* v. *Rock*, 279 U.S. 410 (1929), and *Chesapeake & Ohio Ry.* v. *Mihas*, 280 U.S. 102 (1929), are readily distinguishable. In those cases, this Court held that a petitioner did not have to request the intermediate appellate court to certify a question of importance to the state supreme court *after* the highest court had denied a writ of certiorari. As this Court noted in the former case, by denying the writ of certiorari, the state supreme court, in effect, had affirmed the judgment of the inferior court, and "it would be unreasonable to require a defeated party to apply to the judges of the lower court for a certificate of importance and appeal after the Supreme Court had so approved the judgment." 279 U.S. at 412. Conversely, in this case the Supreme Court of Florida has had no opportunity to pass on the validity of the judgment of which review is now sought in this Court, for it lacked jurisdiction to review by direct appeal in the first instance and discretionary review by a writ of certiorari was not sought later.

The procedural defect in petitioners' position is glaringly apparent. Basically, whatever meaning is attached to the prior transfer of this case by the Supreme Court of Florida to the district court of appeal is irrelevant. Section 4(2) of Article V of the Florida Constitution still provides, in addition to its appeal provisions, that: "The supreme court may review by certiorari any decision of a district court of appeal . . . that passes upon a question certified by the district court of appeal to be of great public interest." Simply stated, to exhaust their remedies below, petitioners had to seek a certification of great public interest. Had such a certification been granted, their case could (and undoubtedly would) have been reviewed by the Supreme Court of Florida. Had such a certification been denied, the opinion of the district court of appeal *then* would have become the judgment of the highest Florida court in which a decision could be had. In either eventuality, review subsequently could have been sought in this Court pursuant to 28 U.S.C. § 1257(3). In the absence of either eventuality, as is true here, this Court has no jurisdiction and the petition for writ of certiorari must be dismissed or denied, for no party can gain access to review by this Court by the simple expedient of speculating that exhaustion of its state remedies would have proven unsuccessful.[9] *Stratton* v. *Stratton*, *supra*, 239 U.S. at 56.

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[9] Section 4(a) of Article V of the Florida Constitution also provides that the Supreme Court of Florida may review by certiorari any decision of a district court of appeal "that is in direct conflict with a decision . . . of the supreme court on the same point of law." Petitioners appear to contend on page 12 of their petition that the decision of the district court of appeal is in conflict with a decision of the Supreme Court of Florida. If this is their position, petitioners thus supply a second reason why their failure to seek certiorari from the Supreme Court of Florida deprives this Court of jurisdiction over this case.

II. EVEN IF THERE WERE JURISDICTION, PETITIONERS SEEK ESSENTIALLY A REVIEW OF THE FACTS, AND THE LIMITED INJUNCTION GRANTED BY THE FLORIDA COURT IS ENTIRELY REASONABLE IN THE CIRCUMSTANCES

Without intending criticism, we point out that petitioners' version of the facts is considerably euphemized, and many of the legal principles which it sets forth are sound but irrelevant here. The abstract question of constitutional law which petitioners argue simply is not present in this case. Rather, the question is "whether the decree rendered was that which should have been rendered in the light of the entire case as disclosed by the record." *McClintock, Equity* 40 (2d ed. 1948). Both the trial court and the intermediate appellate court of Florida found substantial factual support in the record for the decree which petitioners now ask this Court to review. However, even if there were jurisdiction in this case (which we deny), this Court should not "undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co., Inc.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949). Nor should certiorari be granted merely "to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

Picketing, by its very nature, involves something more than mere free speech, and it therefore is subject to reasonable restraints which cannot be applied to conventional forms of communication. *Building Service Union* v. *Gazzam*, 339 U.S. 532, 537 (1950); *Bakery Drivers Local* v. *Wohl*, 315 U.S. 769, 774-75 (1942); *Senn* v. *Tile Layers Union*, 301 U.S. 468, 478-79 (1937).

The reason for such a rule is best illustrated by reference to the facts of this case. Testimony at trial revealed that various acts of misconduct attributable to

the picketers occurred during the demonstrations. These included the intimidation of customers and employees both within and without the store, interference with the free ingress and egress of customers, bomb threats, and insulting telephone calls. (R. 68, T. 10-14, 18, 36-38, 51-52, 55, 59, 83-85, 108-09.) Petitioners contend that since none of those acts could be directly attributed to members of the NAACP, the injunction was improvidently granted. (NAACP Petition, p. 11.) But petitioners invited the public to join with them in the demonstration, and as this Court stated in *Building Service Union* v. *Gazzam, supra:*

> "... picketing is more than speech and establishes a *locus in quo* that has far more potential for inducing action or nonaction than the message the pickets convey ...." 339 U.S. at 537.

Thus, at the very least having induced members of the public to join in their protest against Webb's City, petitioners cannot disclaim responsibility for acts of misconduct which were a direct consequence of that invitation.

Although petitioners infer throughout their petition that the decree of the Florida circuit court proscribes *all* expressions of protest by picketing, the injunction merely forbids repetitions of the various acts of misconduct which were found to have occurred, and limits the picketing to some place other than the premises of Webb's City or the sidewalks immediately adjacent thereto. In view of the number of pickets, their proximity to the entrances of Webb's City, and the several harrassing activities which took place, the limited injunction certainly was not unreasonable as the most appropriate means of preventing a "tense and

inflammatory situation" from deteriorating into violence.[10]

WHEREFORE, in consideration of the foregoing premises, the petition for writ of certiorari should be dismissed for want of jurisdiction or denied.

Respectfully submitted,

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[10] "The question is in each case whether the number of pickets plus the attendant circumstances are such that fear of physical harm rather than persuasion is the force loosed upon the persons sought to be influenced." RESTATEMENT, TORTS, § 779, Comment h (1939). Unlike the statute in *Thornhill* v. *Alabama*, 310 U.S. 88, 104 (1940), which forbade "nearly every practical, effective means whereby those interested . . . may enlighten the public on the nature and causes of a labor dispute," the injunction in this case does not interfere with petitioners' "right to protest the policies of lawful private interests such as . . . [Webb's City's] within proper limits." [R. 74.]

APPENDIX

Florida Constitution Article V, Section 4(2) provides in pertinent part as follows:

"*Jurisdiction.* Appeals from trial courts may be taken directly to the supreme court, as a matter of right, only from judgments imposing the death penalty, from final judgments or decrees directly passing upon the validity of a state statute or a federal statute or treaty, or construing a controlling provision of the Florida or federal constitution, and from final judgments or decrees in proceedings for the validation of bonds and certificates of indebtedness.

• • •

"Appeals from the district courts of appeal may be taken to the supreme court, as a matter of right, only from decisions initially passing upon the validity of a state statute or a federal statute or treaty, or initially construing a controlling provision of the Florida or federal constitution. The supreme court may review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with a decision of another district court of appeal or of the supreme court on the same point of law, and may issue writs of certiorari to commissions established by law."

Florida Appellate Rules 2.1(5)(a) & (b) are identical.